JOHN RAWLS: A THEORY OF JUSTICE

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The object of this piece is to offer a few reflections, provisional and far from rigorous in character, on Professor Rawls' *A Theory of Justice*. In essence, I shall be saying no more than "this seems difficult," or "important" or (rarely) "unsatisfactory." Rawls is, of course, a philosopher; I am trained as a lawyer, and I can only ask that the following remarks be received *de bene esse*.

I

It may be helpful to those who are not familiar with Rawls to plot his position against a better-known moral theory, namely utilitarianism. At any rate, on this side of the Atlantic, where no modern charter contains the compact under which we consent to be governed, the defence of truth and justice has most often in the last hundred years appeared to be in the hands of the utilitarians. This raises two immediate questions: first, is justice a "special department" of morality? And second, do we by this mean to commit ourselves further to the position that the province of justice is not (whatever be the case for the rest of morality) governed by the principles of utility? After looking at these questions, we can go on to assess the particular solution proposed by Rawls.

It is perfectly possible to be, broadly, an utilitarian and yet to give the principles of justice a special status. For instance, in *The Concept of Law,* Professor Hart carefully distinguishes "fairness" (which roughly covers justice) from morality in general.[1] And Hart, I suppose, is a modern utilitarian. Why should the two ever have been confused? The explanation can be found by looking at Mill's chapter on the connection between justice and utility.[2] Mill rightly saw the idea of justice as an obstacle to the simple test of utility in assessing right and wrong. People, that is, went on referring to this rather old fashioned notion, and seemed remarkably attached to it, despite being urged to look to expediency instead. But to Mill, this notion of justice had to be either irrational or the reflection of the operation of a perhaps concealed principle of utility.

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[1] H.L.A. HART, THE CONCEPT OF LAW 153-55 (1961).

[2] J.S. MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 51-80 (1951).

To arrive at this position Mill took one sure and one false step. As he rightly says, "[t]hat a feeling is bestowed on us by Nature, does not necessarily legitimate all its promptings."[3] To feel that something is just or unjust cannot be the test of its justice or injustice unless, as Mill says, one believes that justice is some special quality ("intrinsically peculiar") which can only be perceived by what amounts to a "special revelation." This is a pretty familiar sort of argument of course. But then Mill offers a false choice for us: either the feelings of justice are *sui generis* perceptions like taste or smell, so that debates about justice are to be resolved by asking "does it feel just?," as one might ask whether a cup of tea has enough sugar, or justice is only a combination of certain other qualities of a thing "presented under a peculiar aspect." Mill goes for the latter, and his treatment of justice appears at times more akin to social psychology than moral philosophy, for he regards the powerful sentiments evoked in this area as what are really in need of explanation. The resulting index of justice is simple: utility.

In fact, the choice Mill puts before us—utility or the special quality—is, at least as he presents it, too restricted. There is a middle way, which a theory like Rawls' exemplifies, though no doubt other non-utilitarian but rational theories of ethics can be devised. This view accepts readily that justice is "a thing intrinsically peculiar, and distinct from all . . . other qualities"[4] but denies that it is to be discovered by the "peculiar revelation" which Mill rightly distrusts. Briefly, this sort of theory would assert (a) that justice is a special department of morality; and (b) that what makes it special is not simply the ground it covers (by which I mean fair procedure, etc.) but also the *kinds of arguments* that are deployed over that territory. It is one of the more entertaining consequences of this divergence of approaches that when Mill considers the thoroughly Rawlsian maxim "so act that thy rule of conduct might be adopted as a law by all rational beings," he turns Kant into a utilitarian:[5] but what else could Mill have done?

It is now time to look a little more closely at the way Rawls treats justice; after that, I shall take up some points which, I am sure, are both important and yet by no means obvious.

II

Rawls sets out his main thesis at an early stage; much of the rest of the book is concerned with refining the early broad statement

[3] *Id.* 51.
[4] *Id.* 52.
[5] *Id.* 64-65.

of principle, developing the philosophical arguments on which his case rests (and knocking down objections) and applying his theory to particular problems. There is for Rawls a preliminary distinction to be drawn between the *concept* of and various *conceptions* of justice. Men recognize the concept of justice when they "understand the need for, and are prepared to affirm, a characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation."[6] A conception of justice, then, consists of any set of definite principles selected as being correct. I must confess to some doubt here: can justice, and perhaps other fundamental notions in political philosophy, be so easily and unequivocally distributed between concept and conception?[7] A lot perhaps depends on the force and fineness of the term "characteristic."

In any case, what Rawls proposes is a conception of justice. What, he asks, are the basic principles that "free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association"?[8] There are two: "the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities . . . are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society."[9]

This conception, which Rawls calls "justice as fairness," may appear to be obvious, but Rawls is after big game here, and his premises cannot be accepted lightly. Rawls is not simply engaged in a dispute over definition with his academic opponents, nor is he concerned to defend a generally acknowledged good like liberty of expression. Rather, he is trying to produce a set of principles which anyone who has felt the pull of justice (that is, the concept of justice) would acknowledge. Sometimes one genuinely does not know what would be the right thing to do, and Mill and Rawls could well disagree. In such a case, by ranking justice as the prime virtue, and in turn ranking his two principles of justice, Rawls is arguing that alternative solutions to conflicts of principle are incorrect, whether or not they are presented in the name of justice.

We are being offered, then, a social contract theory in place of

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[6] J. RAWLS, A THEORY OF JUSTICE 5 (1971). *See also id.* 7-11.

[7] *Cf.* Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REV. OF BOOKS, May 4, 1972, at 27 (employing such a distinction).

[8] J. RAWLS, *supra* note 6, at 11.

[9] *Id.* 14-15.

the long-lived rationalist ethic of utilitarianism. It is of course a hypothetical contract for this is an exercise in moral philosophy, in the criticism of institutions, and not an attempt to explain how social arrangements have actually come about. Thus we are not entitled to ask, as did Hume, "what authority any moral reasoning can have, which leads into opinions so wide of the general practice of mankind." But there is a further question which also turns on the relationship between statements of fact and moral judgments: how does the mere fact that certain principles of the moral contract may be selected, insure that those principles are the correct ones? This goes to the heart of "justice as fairness," and in light of this question we may note immediately two features of Rawls' theory. First, it does not attempt to embrace the whole field of morality. "Rightness as fairness" must wait its turn, although Rawls seems to consider that such generalisation would be worth a try. Second, and this seems to me to be more serious for those trying to find their bearings in the Rawls universe, his concern is primarily to give an account of the kind of ideal social arrangements that adherence to his principles would engender.

This leads Rawls to devote a great deal of attention to very fundamental issues of social organization (hierarchies and savings in the design of institutions, etc.) and rather less attention to what could roughly speaking be called jurisprudential problems, which fall into what he terms "partial compliance theory", that is, the adaptation of his theory to the world we actually live in, where people are not necessarily free, rational or just, where disobedience exists and punishment may be necessary.[10] As a consequence of this concentration on "strict compliance theory," the follower of Rawls is left with a significant difficulty in explaining how a theory derived from the postulated choices of men in an imaginary state of affairs can have any applicability to conduct in the real world. I shall return to this difficult question later.

III

I want now to look a little more closely at certain aspects of this theory. First, I should like to go back to the question of what makes this conception a moral one: why are we entitled to say that what men would choose is what they are right to choose? Briefly, the answer is that it is not what they choose, but the way they choose, that insures the morality of their choice. The terms of the contract are settled by men in a situation in which they know very little about themselves

[10] *Id.* 8-9.

and their circumstances; in Rawls' terms they choose behind a veil of ignorance. In this position they will settle only for a society in which basic fair treatment is guaranteed to each individual. Rawls' conception is thus deliberately prepared to meet a basic question which can be asked about any society: why should a person be expected to assent to its arrangements—what do they offer him? In this way the theory is sharply differentiated from any utilitarian theory, according to which the pursuit of happiness for the greatest number precludes the possibility of guaranteeing fairness of treatment to the individual. Rawls can argue then that the utilitarian claim to count each person as one, no one to count for more, no one for less, is thoroughly misleading. Prior to it should be a commitment to the notion of individual personality, too basic to be at the mercy of a felicific calculus.

Two points need consideration. First, how does Rawls know that this is how rational beings would behave in the "original position"? I think the answer must be that Rawls has loaded the odds fairly heavily against any other choice. A gambler would be taking a fearful risk, not only for himself but also on behalf of his children and his children's children, if he turned out to be born on the wrong side of the tracks in a fundamentally unjust society. As a way of eliminating some rather extreme options, this approach has its attractions, but in less drastic situations its role is less clear. Were the gambler assured of some measured amount of fairness of treatment, he might be willing to risk any additional fairness. This goes, of course, to the minimum definition of fair treatment. But the point is that that standard might be sufficiently low that Rawls' two subsidiary principles would not follow as a matter of course.

The second comment that I would make about the alleged ethical superiority of Rawlsian over utilitarian justice is perhaps an index of the difficulty that I find in interpreting the utilitarians rather than a point against Rawls. Obviously if Rawls and the utilitarians really diverge, this ought to show up in their treatment of rights against society. At first sight this appears to be the case. Mill, for instance, considers that justice is closely bound up with the notion of rights, and that "[t]o have a right [is] to have something which society ought to defend me in the possession of. If the objector goes on to ask, why it ought? I can give him no other reason than general utility."[11] Now I think it is at any rate arguable that this dictum should not be treated as conclusive proof that Mill does not understand what rights

[11] J.S. MILL, *supra* note 2, at 66.

are or rate them highly enough. My reason for making this suggestion is that Mill has also set out a list of situations in which the precepts of justice apply, and identified their common factor in the notion of a right, or rather, rights. For Mill, to act morally one must act according to a universalisable principle, so that there would be no way of subverting the rights of any individual that would not also justify the invasion of the rights of the other members of society. And Mill is clear that the disutility of this state of affairs would be overwhelming. (Which comes very close to the position of one who relies on an appeal to "the very notion of a right.")

In short, where Rawls relies on a hypothetical contract, Mill says simply that the world would be a much nastier place to live in, but for the principles of justice.[12] At least this seems a possible way for the utilitarian to argue, even if I have read too much into Mill.

I now wish to turn to some matters which I find very difficult, but which are, I am sure, essential ingredients in any critical account of Rawls' theory. They are connected to the notion of the "original position," and are similar to the sort of criticism of Rawls that points to the unreality of the choices made by wholly ignorant contracting parties. But I am not so concerned with the difficulty of knowing what such people—and hence such choices—would be like. My problem arises from the distinction that Rawls draws between strict and partial compliance theory, which I have already mentioned. Rawls deals for the most part with a perfectly just society in which "[e]veryone is presumed to act justly and to do his part in upholding just institutions."[13] Partial compliance theory, on the other hand, treats injustice. "It comprises such topics as the theory of punishment, the doctrine of just war, . . . the justification of the various ways of opposing unjust regimes" as well as "questions of compensatory justice."[14] Only by considering the just society, however, does Rawls think we can hope to find the answers to the problems of our own imperfect societies. I confess that I find this hard to accept confidently. For one thing, it is not clear how this perfectly just society would work in practice. This is not as silly an objection, I hope, as it may at first sound. It is one thing to criticise existing institutions in light of standards external to those of the society in which the institutions are to be found.[15]

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[12] See Mill's account of the "useful accommodation of language" by which "the character of indefeasibility attributed to justice is kept up, and we are saved from the necessity of maintaining that there can be laudable injustice." *Id.* 79.

[13] J. RAWLS, *supra* note 6, at 8.

[14] *Id.*

[15] Hart does this when making out a case against Devlin. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

There is also an understandable desire in social theory to deal sometimes in "ideal types"—after giving the reader adequate warning of what is going on. In both these cases it is then possible to measure the distance between reality and the ideal state of affairs. But Rawls seems to be going further than either of these critical methods. He appears to be trying to lay down a pattern for a possible society; not in the sense of a possible amendment to an existing society that can plausibly be defended on the basis of knowledge of existing societies (as one might hypothesize that to relax the law on obscenity would not really harm the balance of payments) but in a stronger sense altogether, Rawls is saying: "this would be an ideal society." Yet surely societies are always the product of actual events (and perhaps even the visible witness of inevitable laws)? The enterprise has the same sort of odd ring to it as the notion of the perfect man. Even astronauts are human. At two other places in *A Theory of Justice*, I have a further difficulty with the absence of a theory of how society works, and I again feel that this leads to trouble when one turns to the question of how society ought to be made to work.

The subject of justice, Rawls says, is "the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements."[16] The key word is "fundamental." Even under the revealed reason of a written constitution, the kinds of interests that this term covers seem subject to debate (though no less worth defending because of that). All of this, of course, in Rawls' own system, must involve partial compliance theory; though perhaps "the way" should not be taken too literally. In any case, I find a sort of circularity here, only partially concealed by the blend of the conceptual and the empirical in the passage in question. The trouble is surely not that this kind of objection merely shows my inability to distinguish the role of the moral philosopher from that of the political economist. It is rather that there may be legitimate doubt as to the appropriateness of purely speculative systems in this area.

That is one example of the difficulty that I have found in pinning down the thesis of this work. It recurs when Rawls discusses the principle of the rule of law. "[T]he law," he says, "defines the basic structure within which the pursuit of all other activities takes place."[17]

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[16] J. RAWLS, *supra* note 6, at 7.

[17] *Id.* 236.

How does this fit the statement that I have just quoted of the basic structure of society? Of course, if legal systems have no gaps, then in some sense all our activities can be placed under some rule of the system; liberty is no longer the silence of the laws. But any serious account of the basic structure of a society would presumably take that for granted and would be concerned with the actual norms, whether legal or not, according to which activity is in practice directed, and additionally, where the norms are legal, with the function of the norms as distinct from their content (as, for instance, Karl Renner uses the notion of the functional transformation of norms).[18] What makes laws basic in the usual case is simply that they do as a matter of fact lie at the root of certain societies.[19] But the law comes a bad second in comparison to other factors that necessarily determine this quality of institutions, though there is a whole possible area of study which could trace in given cases just how bad.

A last instance of what I find to be an insecure foundation, somewhere between heaven and earth, can be found in the chapter on *Distributive Shares*,[20] in which Rawls attempts to set out an arrangement of institutions—neutral as between private property systems and socialism—that will fulfill the requirements of his theory of justice. There is no doubt that this must be taken as being a very important and explicit statement of Rawls' views. But what status does Rawls intend his precepts for the institutions of the just society to enjoy? Are they supposed to work? This is not at all straightforward. One is surely in the realm of partial compliance theory here, yet Rawls is defining standards rather than predicting contractual arrangements, and this apparently on the basis of the original position, that is, strict compliance theory. Nor am I clear as to the usefulness in practice of the Archimedean viewpoint[21] from which society is to be measured against Rawlsian justice. On the one hand, one is estopped, as it were, from arguing that the fundamental arrangements of society simply will not do, since the theory is neutral at this point. But one is still expected to be able to show (remind?) erring members of society that their desires and aspirations are incompatible with justice. Therefore I repeat: anyone who is going to hitch his wagon to Rawls will

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[18] K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS 81-95, 205, 251-60 (1949).

[19] Rawls' comparison with the rules of a game is a giveaway in this regard. *See* J. RAWLS, *supra* note 6, at 235-43. To talk of what is basic, unless it is treated in an ad hoc way, can be misleading.

[20] *Id.* 258-332.

[21] *Id.* 261.

have to think very hard about the way the concepts he is using are related to each other and the world.[22]

IV

One last point may be made before I try to sum up my comments. This is a grand theory, and perhaps it tries to do a little too much at times. It is true that Mill puts all questions of justice under the rule of utility, and that this may lead to an unsatisfactory or less than entirely clear account of the problem. But I feel that some of the questions traditionally considered by theorists of justice fit even less readily into a scheme based on an original contract. As an example, I wonder whether it is only the fact that they belong to "partial compliance theory" that makes such notions as *mens rea* appear to fit awkwardly into Rawls' theory. Similarly, Rawls says that "[i]t would be an intolerable burden on liberty if the liability to penalties was not normally limited to actions within our power to do or not to do."[23] But the objection to punishing an unfree man cannot be that the criminal law thereby operates as a limitation on his freedom of choice, at least if that is why Rawls here invokes the notion of liberty, since the man was, by hypothesis, not free to choose. The real offense to our notions of responsibility and desert is rather that the connection between the legal and the moral wrong is broken.

Conclusion

As I said in my opening remarks, this piece does not aim very high. In it I have attempted two things: to sketch the way in which Rawls diverges from the utilitarians, and to record some of the difficulties that I have experienced while following his argument. Briefly, these latter can be placed under two heads: the problem, stemming from the notion of the "original position," of relating strict compliance theory to the real world, and the problem of whether it is desirable to refer all questions of justice directly or mediately to a single grand theory. Of one thing I am convinced: Rawls will be ill-served by any follower who fails to realise that the argument of this book, though of great power, is neither simple nor self-evident.

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[22] *Cf.* the account of the various "branches of government," which is reminiscent of the eulogies of the working of the separation of powers. *Id.* 277-84.

[23] *Id.* 237.